1989

Empire Land Title, Inc., aka Empire Title Company: Appellant's Reply to Respondent's Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

EMPIRE LAND TITLE, INC., aka EMPIRE TITLE COMPANY, Plaintiff and Respondent,	:	Case No. 890171-CA
vs.	:	
WEYERHAEUSER MORTGAGE COMPANY, Defendant and Appellant.	:	Priority: 14(b)

APPELLANT'S BRIEF

APPEAL FROM A FINAL ORDER OF THE FOURTH
JUDICIAL CIRCUIT COURT, UTAH COUNTY
THE HONORABLE E. PATRICK McGUIRE

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JURISDICTION

Article VIII, Section 5, of the Utah Constitution, Utah Code Ann. Section 78-2a-3(2)(d), and Rule 3(a) of the Rules of the Utah Court of Appeals, confer jurisdiction upon this Court to hear this appeal.

NATURE OF PROCEEDING

This appeal is taken from the final judgment of the Fourth Judicial Circuit Court of Utah County, Provo Department, entered by the Honorable E. Patrick McGuire (the "Judgment").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Are Empire Land Title, Inc.'s ("Empire") claims, which were brought pursuant to an assignment from Kelly Wilson ("Wilson"), barred by Weyerhaeuser Mortgage Company's ("Weyerhaeuser") affirmative defenses which were available against Wilson?

2. Were Empire's claims barred by Utah Code Ann. Sections 78-12-25 and 26 because the Complaint was filed in excess of four (4) years following the payment of money to Weyerhaeuser?

3. Alternatively, if the circuit court's ruling applying a 6-year statute of limitations is upheld, did Empire's assignor breach its obligations under the writing (the Beneficiary Statement), thus excusing the need for Weyerhaeuser's performance?

4. Did Empire's failure to join Shand Morahan & Company and P. Scott Construction Company result in the absence of real parties in interest and/or indispensable parties under the Utah Rules of Civil Procedure, thus precluding the relief awarded to Empire?

5. Was Empire's claim against Weyerhaeuser subject to an offset for the amounts Wilson should have paid Weyerhaeuser under the Beneficiary Statement or for the fair rental value of the property?

6. Did Empire fail to establish its damages, if any, with the necessary specificity?

7. Did the circuit court err in providing an award of attorneys' fees expended in collecting the judgment?

PERTINENT STATUTES AND RULES

The following authorities are dispositive of the issues herein:

a. Utah Code Ann. Section 78-12-23 (1987) provides:

> **78-12-23. Within six years - Mesne profits of real property - Instrument in writing - Distribution of criminal proceeds to victim.**
>
> Within six years.
>
> (1) An action for the mesne profits of real property.
>
> (2) An action upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.
>
> (3) An action instituted under Section 78-11-12.5 regarding distribution of criminal proceeds to any victim.

b. Utah Code Ann. Section 78-12-25 (Supp. 1988) provides:

> **78-12-25. Within four years.**
>
> Within four years:
>
> (1) An action upon a contract, obligation or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services

rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.

(2) A claim for relief or a cause of action under the following sections of Chapter 6, Title 25, the Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 26-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1).

(3) An action for relief not otherwise provided for by law.

c. Utah Code Ann. Section 78-12-26 (1987) provides:

78-12-26. Within three years.

Within three years:

(1) An action for waste, or trespass upon or injury to real property; except that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting such waste or trespass.

(2) an action for taking, detaining, or injuring personal property, including actions for specific recovery thereof; except that in all cases where the subject of the action is a domestic animal usually included in the term 'livestock', which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant.

(3) an action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(4) an action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state.

(5) an action to enforce liability imposed by Section 78-17-3, except that the cause of action does

not accrue until the aggrieved party knows or reasonably should know of the harm suffered.

d. Utah R. Civ. P. 17 provides:

Rule 17. Parties plaintiff and defendant.

(a) **Real party in interest.** Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the state of Utah. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

e. Utah R. Civ. P. 19 provides:

Rule 19. Joinder of persons needed for just adjudication.

(a) **Persons to be joined if feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper

case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

RELIEF SOUGHT ON APPEAL

Weyerhaeuser requests that this Court reverse the circuit court's judgment below on any or all of the grounds argued, and that this Court remand this case to that court for dismissal.

STATEMENT OF THE CASE

In late summer of 1982, Wilson agreed to purchase a parcel of property in American Fork, Utah. At that time, Wilson, Empire and Weyerhaeuser's loan assumption department believed the property was owned by P. Scott Construction Company and that there was a serious default respecting an underlying mortgage on the property with Weyerhaeuser. Empire agreed to conduct the closing on the sale, and caused a title search to be conducted on the property. Also, Empire requested from Weyerhaeuser's assumption department, information respecting the amounts necessary for Wilson to assume the loan then believed to be existing. Weyerhaeuser provided a Beneficiary Statement which reflected that a closing on the property must occur before September 15, 1982, and that the assumption charges on the mortgage would be $5,473.04. The Beneficiary Statement also provided "loan payments must be brought and kept current during the escrow as loan activity will continue.", that payments on the property were $213.00 per month and that the payments would be due on the

first of every month thereafter. It was Empire's custom and habit to explain the significance of these obligations of payments to purchasers of property assuming mortgages, and there is no evidence the custom and habit was not followed in this instance. The amount of $5,473.04 was transmitted by Empire to Weyerhaeuser, although it was not established at trial who originally paid the money.

After receiving apparent title to the property, Wilson allowed Bart Papworth ("Papworth") to reside on the subject premises from September 1982 through May 1985. The fair rental value for the premises during this period of time was $350.00 per month, for a total fair rental value of $11,200.00 for the 32 months involved. No one made any payments to Weyerhaeuser during this period of time.

Wilson later discovered that, unbeknownst to both Empire and Weyerhaeuser's assumption department, the property he had attempted to assume had, in fact, been foreclosed prior to September 1982. Wilson and his parents, Max and Sue Wilson, demanded that Empire reimburse them for their losses as a result of the transaction. After some negotiations, Empire and its errors and omissions carrier made a cash payment to Wilson, Max Wilson and Sue Wilson in settlement of their claim. As part of the settlement agreement, Wilson assigned his claims against Weyerhaeuser to Empire and to Shand Morahan & Company, Empire's errors and omissions insurance carrier. Wilson's parents did not make

any assignment to Empire. Empire thereafter made demand upon Weyerhaeuser for repayment of the money paid to Weyerhaeuser after the closing. Weyerhaeuser refused to pay the money to Empire without receiving the fair rental value or mortgage payments in return. Empire commenced this action on March 23, 1987.

STATEMENT OF FACTS

The circuit court's record consists of two separate transcripts. In this Statement of Facts, reference will be made to the Transcript of Trial, or to the Transcript of Cross Examination of Thomas Hare ("Cross Examination Transcript").

a. On August 26, 1982, at Empire's request, Weyerhaeuser delivered a written Beneficiary Statement to Empire setting forth that there was a $5,473.04 deficiency on a mortgage between Weyerhaeuser and P. Scott Construction Company which Wilson desired to assume (plaintiff's Exhibit 1; Transcript of Trial, p. 14).

b. The Beneficiary Statement reflected that "P. Scott Constr. Co." was the mortgagor, that the monthly payments under the mortgage would be $213.00, and further provided that "Loan payments must be brought and kept current during this escrow as loan activity will continue." It was Empire's custom and habit at all closings to explain to purchasers assuming loans that the purchasers would be required to make monthly payments on assumed loans (plaintiff's Exhibit 1; Cross Examination Transcript, p. 9).

c. At some time between their original contact with Wilson and the closing on September 13, 1982, Empire conducted a title search on the property. Empire failed to discover in their search, however, that the property had been sold at a trustee's sale on March 26, 1982, and that a trustee's deed had been recorded in April of 1982 (Transcript of Trial, pp. 16-19 and 21; Cross Examination Transcript, p. 10; plaintiff's Exhibit 3).

d. At the time of closing on the attempted assumption on September 13, 1982, the mortgage to be assumed had been previously foreclosed, unbeknownst to Weyerhaeuser's assumption department and to Empire (plaintiff's Exhibit 3; Transcript of Trial, pp. 20-24).

e. On September 13, 1982, Empire provided Weyerhaeuser with a check for $5,473.04. The voucher portion of the check, also provided to Weyerhaeuser, made reference to P. Scott Construction Company and to the loan, but not to Wilson (plaintiff's Exhibit 2; defendant's Exhibit 7; Cross Examination Transcript, p. 18).

f. It was not established at trial whether the money paid to Weyerhaeuser originally came from Wilson or another (Cross Examination Transcript, pp. 14 and 16).

g. Subsequent to the closing, Papworth retained the use and possession of the subject property. Papworth remained in possession from September 6, 1982 until May 6, 1985 (Transcript of Trial, pp. 29-30, 38 and 73).

h. The fair rental value of the property between September 1982 and May 1985 was stipulated by the parties to have been $350.00 per month (Transcript of Trial, p. 43).

i. From September 1982 through May 1985 neither Wilson, Empire nor Papworth made any mortgage or rental payments to Weyerhaeuser (defendant's Exhibit 14; Transcript of Trial, pp. 69-70 and 74; Cross Examination Transcript, p. 23).

j. At some time following the closing, it was discovered that Weyerhaeuser's foreclosure department had previously foreclosed the mortgage intended to be assumed. On April 12, 1984, Empire demanded repayment of $5,473.04 from Weyerhaeuser (plaintiff's Exhibit 4; Transcript of Trial, pp. 23-28; defendant's Exhibit 14).

k. On April 16, 1985, Empire and its errors and omissions insurance carrier settled with Empire's clients, Wilson, Max Wilson and Sue Wilson (plaintiff's Exhibit 5; Transcript of Trial, pp. 24-25; Cross Examination Transcript, pp. 5-6).

l. Approximately one-third (1/3) of the settlement money paid to the Wilsons was, in fact, paid by Shand Morahan & Company, Empire's errors and omissions insurance carrier. Empire did not establish, at trial, the amount it actually paid in the settlement (Cross Examination Transcript, pp. 5-6).

m. Empire's alleged rights to pursue the action arose from a Release and Assignment of Claims dated April 16, 1985,

which assigned only Kelly Wilson's claims (Cross Examination Transcript, pp. 14-16; plaintiff's Exhibit 5).

n. Wilson's tenant, Papworth, did not vacate the subject property and return it to Weyerhaeuser until May 1985, following a request from Weyerhaeuser (Transcript of Trial, pp. 73 and 76).

o. Empire's action herein was commenced on March 23, 1987, alleging three theories of recovery: (i) breach of agreement; (ii) unjust enrichment; and (iii) mistake (Complaint, R. 1-3).

p. At trial, counsel for Empire acknowledged he was not pursuing attorneys' fees, that there was no contractual basis for an award of attorneys' fees, and that Weyerhaeuser's defenses were valid and did not justify any statutory award of attorneys' fees (Transcript of Trial, p. 99).

SUMMARY OF ARGUMENT

Weyerhaeuser appeals the circuit court's judgment in favor of Empire. In reviewing the facts of this case, it must be recalled from the outset that Empire brought its claim pursuant to an assignment from Wilson, and no one else. Thus, Empire is limited to those claims Wilson himself could have asserted, and is subject to the defenses which could have been asserted against Wilson and were asserted against Empire.

Additionally, Empire failed to pursue its action for four and one-half years after the mistake, precluding its relief by virtue of the applicable statutes of limitation. Further, the evidence at trial failed to establish that Wilson himself had

paid the original $5,473.04 which was the subject of the dispute. The evidence did establish, however, that Empire's errors and omissions insurance carrier, Shand Morahan & Company, paid approximately one-third of the settlement amount actually paid to Wilson and his parents. Empire, however, did not join Shand Morahan & Company, clearly a real party in interest, as plaintiff. Empire also failed to join the sellers or tenant of the property who were indispensable to afford relief.

The only possible basis for the ruling of the court below would be based upon the court's desire for restitution damages arising from mistake. However, in assessing damages for mistake, both parties must be placed in the position they had been in prior to the mistake. A prerequisite to this is that Empire tender any benefits they (or their assignor) receive. In this case, it was established that Wilson's tenant, Papworth, occupied the premises from September 1982 through May 1985. If Empire is awarded damages under either its unjust enrichment or mistake theory, it must first tender to Weyerhaeuser the fair rental value of the property from September 1982 through May 1985 ($11,200.00) or the mortgage payments Wilson did not make ($6,816.00, excluding late fees and additional interest). Wilson's failure to make these payments also excused Weyerhaeuser from performing. Finally, the court's award of attorneys' fees in its judgment is in contravention of the claims of the parties and the applicable law.

ARGUMENT

POINT I

EMPIRE IS LIMITED TO THE RIGHTS OF ITS ASSIGNOR, WILSON, AND IS SUBJECT TO WEYERHAEUSER'S DEFENSES.

Empire brought its claim through an assignment from Wilson. It is "[f]undamental to the law of assignments that an assignee take nothing more by his assignment than his assignor had." Wiscombe v. The Lockhart Co., 608 P.2d 236 (Utah 1980). As such, Empire was and is subject to any defenses which Weyerhaeuser could assert against Wilson if this action had been brought by Wilson in his own name. It is thus apparent that the statute of limitations, Wilson's breach respecting his required performance, and Wilson's failure or refusal to return the benefits he received as a result of the parties' mistake, bar any relief to Empire. All of these affirmative defenses are set forth more fully below.

POINT II

EMPIRE'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATION.

Utah Code Ann. Section 78-12-25 (Supp. 1988) provides that actions upon contracts, obligations or liabilities not founded upon instruments of writing must be commenced within four (4) years. Alternatively, Utah Code Ann. Section 78-12-26 (1987) provides that actions for relief upon the ground of mistake must be brought within three (3) years. The transaction giving

rise to this lawsuit occurred on September 13, 1982, at the closing of the real estate transaction. Empire failed to take any action respecting the mistake until March 23, 1987, four and one-half years after the closing. Clearly, all of Empire's claims were barred by the applicable statute of limitations, and the circuit court erred in allowing Empire to prevail on these theories.

The only possible ground upon which Empire's claims were not barred by the applicable statute of limitations would be if the Beneficiary Statement (Exhibit P1) or the check from Empire to Weyerhaeuser (Exhibit P2) could be found to be the origin of Empire's claims, thus invoking the 6-year statute of limitations found in Utah Code Ann. Section 78-12-23 for "an action upon any contract, obligation, or liability founded upon an instrument in writing..." The Beneficiary Statement and the check, however, lacked the specificity necessary to form a contract. Valcarce v. Bitters, 12 Utah 2d 61, 63, 362 P.2d 427 (1961) ("A condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly with sufficeint definiteness to be enforced.") quoted and reaffirmed in Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317, 1321 (Utah 1976). Further, Wilson was not even identified on the Beneficiary Statement or the check. The action arose not from any writing between the

parties, but rather as a result of mistakes made by Empire, Wilson and Weyerhaeuser.

The Utah Supreme Court has repeatedly reaffirmed that the six year statute of limitations in Utah Code Ann. Section 78-12-23 only applies "when the contract, obligation or liability grows out of written instruments, not remotely or ultimately, but immediately." (emphasis in original). Bracklein v. Realty Ins. Co., 95 Utah 490, 80 P.2d 471, 476 (1938), quoting O'Brien v. King, 174 Cal. 769, 164 P. 631, 632 (Cal. 1917). In Bracklein, the court found an action to enforce an assumption of a mortgage to be founded in the language of the deed requiring that the conveyance be subject to an assumption. Thus the obligation to pay money in Bracklein arose directly from the written instrument. Bracklein has been followed repeatedly, including in the cases of Evans v. Pickett Bros. Farms, 28 Utah 2d 125, 499 P.2d 273 (1972) (Action under a written contract); and Brigham Young University v. Paulsen Constr. Co., 744 P.2d 1370 (Utah 1987) (the test for determining the applicability of the 6-year statute of limitations is "[I]f the fact of liability arises or is assumed or imposed from the instrument itself, or its recitals, the liability is founded upon an instrument in writing") (quoting Bracklein, 95 Utah 490, 500, 80 P.2d 471, 476). Here, any obligation of Weyerhaeuser to repay money could not arise under any writing since there is no writing requiring any repayment in the event of a mistake.

POINT III

ASSUMING THERE WAS AN INSTRUMENT IN WRITING JUSTIFYING A SIX-YEAR LIMITATION, EMPIRE IS OTHERWISE PRECLUDED FROM BRINGING ITS ACTION.

Assuming, arguendo, the Beneficiary Statement constitutes an instrument in writing extending the statute of limitations to six years, Empire is precluded from receiving any damages by virtue of Wilson's breach of the terms of that writing. McCarren v. Merrill, 15 Utah 2d 179, 389 P.2d 732 (1964) (Homeowner's failure to pay plumber, resulting in plumber's ceasing to work on job, precluded the homeowner's claim for damages resulting from work stoppage.); Petersen v. Intermountain Capital Corp., 29 Utah 2d 271, 508 P.2d 536 (1973) (Demonstration of an intent by one party to not perform the contract relieves other party of requirement of performance.). The Beneficiary Statement provided, in clear and unequivocal terms, that "loan payments must be brought and kept current during this escrow as loan activity will continue." The Beneficiary Statement further recited that payments of $213.00 were payable on or before the first of every month. It was Empire's custom and practice to point this obligation out to their clients. Despite this obligation, testimony at trial revealed that neither Wilson, nor anyone acting on his behalf, ever made any payments to Weyerhaeuser from the period of time between September 1982 and May 1985, despite an obligation to do so. Clearly, this long-standing failure to make payments as provided under the contract would have excused Wey-

erhaeuser from its ultimate performance of delivering title of the property to Wilson. Wilson's failure to comply with the terms of the alleged contract, evidencing the breach, justified Weyerhaeuser's refusal to perform.

POINT IV

EMPIRE WAS REQUIRED, AS A PREREQUISITE TO ITS CLAIM, TO OFFER TO WEYERHAEUSER THE FAIR RENTAL VALUE, OR PAST DUE MORTGAGE PAYMENTS ON THE PREMISES INVOLVED.

The Restatement of Contracts provides:

> **Section 349.** Necessity of Returning the Consideration Received by Plaintiff.
>
> (1) If the plaintiff has received any interest in land or goods or any other property in exchange for his own performance, he cannot get judgment for restitution in money unless promptly after knowledge of the breach he returns or offers to return what he has received, in substantially as good a condition as when it was transferred to him, except as stated in Subsection (2).

Illustration 1 of subsection 1 of the Restatement states:

> 1. A contracts to sell land to B, who is at once put in possession of the land, and makes an advance payment of $1,000. A later tenders a conveyance that is insufficient because of substantial defects in his title, and B rightly refuses to accept it. B can get judgment against A for the restitution of the $1,000 payment, diminished by the value of the use and occupation of the land, if he promptly surrenders possession of the land after knowledge of A's breach.

Contrary to Restatement of Contracts Section 349, however, Empire seeks a return of the $5,473.04, paid by mistake to Weyerhaeuser, without offering any compensation for Wilson's possession of the property; and without paying any mortgage pay

ments or rental thereon from September 1982 to May 1985. Neither Empire, Wilson nor Papworth has ever offered to compensate Weyerhaeuser for the fair rental value of the property or for the mortgage payments never made. As a consequence, Empire's claim must be reduced by the offset to which Weyerhaeuser is entitled which, under the stipulated fair rental value of $350.00 a month at trial, would be $11,200.00. The mortgage payments never made, excluding late fees and additional interest, were $6,816.00.

Comment C to Restatement of Contracts Section 349 further requires a prompt return of the property as a prerequisite to restitution. It provides: "after [knowledge of breach] is acquired, the retention and continued use of land, or the retention and continued use or consumption of goods, make restitution unavailable as a remedy for the breach then known to exist." Wilson and Papworth did not return the property to Weyerhaeuser until after May 1985, when Weyerhaeuser requested Papworth to leave.

POINT V

EMPIRE FAILED TO JOIN THE REAL PARTIES IN INTEREST IN THIS ACTION, AND OTHER PERSONS NEEDED FOR JUST ADJUDICATION.

Utah R. Civ. P. 17 and 19 set forth requirements for parties in civil actions, generally requiring that the real parties in interest, and those parties necessary for a just adjudication of the controversy be brought before the court. These Rules

"both seek to protect the same interests: judicial economy and fairness to the parties in litigation." Kemp v. Murray, 680 P.2d 758, 760 (Utah 1984). Rule 19 is to "guard against the entry of judgment which might prejudice the rights of [indispensable parties] in their absence", and the Rule further "protects the interests of parties who are present by precluding multiple litigation and contradictory claims over the same subject matter as the original litigation. Rule 17(a) serves essentially the same policy by requiring an action to be brought by the real party in interest." Id.

At the trial in this matter, Empire was unable to establish that Wilson had actually paid the original $5,473.04 which went to Weyerhaeuser. Empire thus has failed to prove that it in fact holds an assignment from the party entitled to recovery from Weyerhaeuser, if any party is entitled to such recovery. Further, Empire did not pay all of the amount returned to Wilson upon discovery of the mistake. Rather, Shand Morahan & Company, Empire's errors and omissions carrier, paid approximately one-third of the settlement amount. Thus, Empire failed to establish its entitlement to recovery of the entire $5,473.04. Without an assignment, Empire clearly cannot pursue those monies paid by Shand Morahan & Company.

Additionally, Empire failed to join certain persons who may have been needed for just adjudication. Rule 19(a) requires joinder of those parties if:

> (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

In this case, the original seller of the property, P. Scott Construction Company, was not made a party to the action, nor was Papworth, the tenant in the property from September 1982 through May 1985. P. Scott Construction Company was an indispensable party by virtue of its misrepresentation or concealment of the actual foreclosed status of the property and Papworth should have been brought forth as an indispensable party to the unjust enrichment claim since he, if anyone, was unjustly enriched.

POINT VI

EMPIRE FAILED TO PROVE ITS DAMAGES IN THE COURT BELOW WITH THE SPECIFICITY REQUIRED.

In Bunnell v. Bills, 13 Utah 2d 83, 368 P.2d 597 (1962), the Utah Supreme Court has clearly precluded courts from awarding damages based upon speculative and conjectural evidence. The principle has been repeatedly reaffirmed. See, e.g., Winsness v. M. J. Conoco Distributors, 593 P.2d 1303 (Utah 1979) (affirming that damages based upon "mere speculation" cannot be upheld), Bastion v. King, 661 P.2d 953 (Utah 1983) (findings of fact must provide a basis for determining whether there is a rational

basis for the award of damages). In this case, as is set forth in Point V above, Empire was unable to establish at trial: (1) that Wilson actually paid any money to Weyerhaeuser Mortgage Company; and (2) that Empire Land Title paid all of the money for which it seeks reimbursement, in settlement of this matter. Empire should not have been awarded judgment in light of its inability to meet its burden of establishing its damages.

POINT VII

THE COURT'S AWARD OF ATTORNEYS' FEES "EXPENDED IN COLLECTING" THE JUDGMENT WAS ERRONEOUS.

Generally, attorneys' fees are only awarded where there is a statutory or contractual basis for an award. Amica Mutual Ins. Co. v. Schettler, 768 P.2d 950 (Utah Ct. App. 1989) Petition for Cert. filed 104 Utah Adv. Rep. 3 (March 17, 1989) (890091); Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988). In this case, counsel for Empire conceded at trial there was no contractual or statutory basis for an award of attorneys' fees, however, the circuit court's judgment entered in this matter provided "this Judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit." No contractual or statutory basis for an award of attorneys' fees was ever asserted at trial, the circuit court's Findings of Fact and Conclusions of Law contained no reference to such a basis for an award of attorneys' fees, and there is, in fact,

no basis for an award of such attorneys' fees. Therefore, the circuit court's judgment award of attorneys' fees in collecting the judgment is in error, and the same should be reversed.

CONCLUSION

The court below erred in failing to recognize and consider any of the issues addressed above.

Empire, in pursuing it claims, is limited to the claims of its assignor, Wilson. As such, its claims were barred by virtue of the statutes of limitation and the lapse of more than four years from the closing of the transaction.

Furthermore, Empire's claims failed because Empire's assignor breached his obligations under any agreement which may have existed between the parties. Wilson's total failure to make payments to Weyerhaeuser excused Weyerhaeuser's performance. This failure also entitled Weyerhaeuser to demand, as a condition of return of any refund to Empire, that Weyerhaeuser be reimbursed for the benefit received by Wilson. Empire failed to do so, and thus Weyerhaeuser had no obligation to return any funds.

Empire failed to meet its burden of proof respecting the damages it sustained, and failed to bring indispensable parties before the court. Finally, the award of attorneys' fees for collection as set forth in the judgment was in error and in clear contravention of the relief sought by the parties.

Respectfully submitted this 24 day of May, 1989.

WINDER & HASLAM, P.C.

By: /Donald J. Winder/
Donald J. Winder
Lincoln W. Hobbs
Attorneys for Appellant

CERTIFICATE OF HAND DELIVERY

I hereby certify that I caused the original and seven (7) copies of the foregoing APPELLANT'S BRIEF to be hand delivered this 24 day of May, 1989, to:

Clerk of the Court
Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

/Donald J. Winder/

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be mailed, first class, postage prepaid, this 24 day of May, 1989, to:

Mark F. Robinson
ROBINSON, SEILER & GLAZIER
Attorneys for Respondent
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IN THE FOURTH CIRCUIT COURT FOR UTAH COUNTY

STATE OF UTAH, PROVO DEPARTMENT

EMPIRE LAND TITLE, INC.,
aka EMPIRE TITLE COMPANY,

Plaintiff,

vs.

WEYERHAEUSER MORTGAGE COMPANY,

Defendant.

JUDGMENT

Civil No. 873000903CV

The above-entitled matter came on regularly for trial on the 17th day of November, 1988, the Honorable E. Patrick McGuire presiding. The Plaintiff was represented by Mark F. Robinson. The Defendant was represented by Donald Winder. The Court having heard the testimony introduced on behalf of the parties and being fully advised in the premises, and having heretofore entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED

1. That Judgment is granted to the Plaintiff in the amount of $5,473.04 together with interest at the rate of

ten percent (10%) per annum from September 13, 1982 to the date of Judgment and twelve (12%) percent per annum from the date of Judgment, until paid in full and for court costs in the amount of $48.75.

It is further ordered that this Judgment shall be augmented in the amount of reasonable costs and attorneys fees expended in collecting said Judgment by execution or otherwise as shall be established by affidavit.

DATED this 11th day of ~~January~~ February 1989.

BY ~~THE~~ COURT:

E. PATRICK McGUIRE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Judgment and Affidavit of Court Costs to Donald J. Winder, WINDER & HASLAM, P.C., 175 West 200 South, Suite 4004, P.O. Box 2668, Salt Lake City, UT 84110-2668, postage prepaid, this 9th day of ~~January~~ February 1989.

Secretary

D56702.2

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IN THE FOURTH CIRCUIT COURT FOR UTAH COUNTY

STATE OF UTAH, PROVO DEPARTMENT

EMPIRE LAND TITLE, INC.,
aka EMPIRE TITLE COMPANY,

Plaintiff,

vs.

WEYERHAEUSER MORTGAGE COMPANY,
Defendant.

FINDINGS OF FACT and CONCLUSIONS OF LAW

Civil No. 8736000303CV

The above-entitled matter came on regularly for trial on the 17th day of November, 1988, the Honorable E. Patrick McGuire presiding. The Plaintiff was represented by Mark F. Robinson. The Defendant was represented by Donald Winder. The Court having heard the testimony introduced on behalf of the parties and being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Plaintiff is a corporation organized and existing under the laws of the State of Utah, and doing business in Utah County, Utah.

2. Defendant is a mortgage company doing business in Utah County, Utah.

3. The amount prayed for herein is less than $10,000.00.

4. On August 26, 1982, pursuant to Plaintiff's request, Defendant delivered a written beneficiary statement to Plaintiff setting forth the amount of money necessary for assumption of a mortgage loan owned and held by Weyerhaeuser Mortgage company.

5. By its written commitment in the Beneficiary Statement, Defendant agreed with Plaintiff to allow Plaintiff's client to assume the mortgage referred to in the Beneficiary Statement by complying with the terms of that statement.

6. Plaintiff fully complied with all the terms of the Beneficiary Statement by delivering to Defendant Weyerhaeuser Mortgage its check #2325 in the amount of $5,473.04 on September 13, 1982.

7. Defendant negotiated Plaintiff's check and kept the funds.

8. Defendant breached its agreement with Plaintiff by failing to effect the assumption intended by the Beneficiary Statement.

9. On or about April 12, 1984, Plaintiff discovered that Defendant had breached its agreement and in fact had, on or about March 26, 1982, foreclosed the mortgage intended to be assumed and had recorded a Trustee's Deed and taken title to the property by a Trustee's Deed recorded as Entry No. 8070, in Book 1973, at pages 75 through 77 of the records of Utah County, Utah.

10. Despite demand, Defendant has failed and refused to return the funds paid by Empire to Defendant for assumption of the loan.

11. Because of Defendant's failure and refusal to return the funds paid or the assumption to Empire, Empire has further been damaged in that it has been required to restore those funds with interest to its escrow client and has incurred attorney's fees and expenses in dealing with this matter.

12. Since September 13, 1982, Defendant Weyerhaeuser has held, used and kept funds in the amount of $5,473.04 belonging to the Plaintiff and to which it was not entitled. Defendant Weyerhaeuser has been unjustly enriched at the expense of Empire Title Company and Empire is entitled to recover its funds, with interest from the Defendant.

13. The Court finds that the Plaintiff has proven the elements in its first claim for relief and in its second claim for relief. The Court makes no finding as to Plaintiff's third claim for relief.

14. The Court finds that the defense has not proven the element of their Counterclaim and, therefore, the same is dismissed.

15. The Court finds that the Defendant's third defense, Statute of limitation, does not apply and that there are writings exhibiting agreement between the parties (Exhibits 1 and 2). Further, the court finds that the Plaintiff brought the Complaint in a timely manner after error was discovered.

CONCLUSIONS OF LAW

16. Judgment should be granted to the Plaintiff in the amount of $5,473.04 together with interest at the rate of ten percent (10%) per annum from September 13, 1982 to the date of judgment and twelve percent (12%) per annum from the date of judgment until paid in full, and court costs in the amount of $48.75.

17. The terms of the Judgment should comport with the Findings of Fact entered herein.

DATED this 17 day of ~~January~~ February, 1989.

BY THE COURT:

E. PATRICK McGUIRE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to Donald J. Winder, WINDER & HASLAM, P.C., 175 West 200 South, Suite 4004, P.O. Box 2668, Salt Lake City, UT 84110-2668, postage prepaid, this 9th day of ~~January~~ February, 1989.

Secretary

D56702